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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT TRUST COMPANY,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

No. ~~588~~ 173

## PETITION FOR CERTIORARI.


THOMAS W. WHITE,
LEVI COOKE,
*Counsel for Petitioners.*

S. W. FORDYCE, JR.,
JOHN H. HOLLIDAY,
ALBERT D. NORTONI,
*Of Counsel.*



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*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

No. ———

## PETITION FOR CERTIORARI.

*To the Supreme Court of the United States of America:*

The petition of Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company for writ of *certiorari*, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to bring before the Supreme Court the case of Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment

Trust Company, Appellants, v. United States of America, Respondent.

The said petitioners respectfully show to the Court as follows:

I.

That on January 29, 1907, at the January Term of the District Court of the United States for the Western District of Louisiana, held at the City of Alexandria, in said State, an indictment was returned and filed against the Waters Pierce Oil Company, a corporation of the State of Missouri, which charged the defendant, Waters Pierce Oil Company, with receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903 (39 Stat. 847); that said cause proceeded to trial on March 20, 1914, and the jury returned a verdict of "guilty", upon which the Court entered judgment in favor of the plaintiff, the United States of America, for the sum of fourteen thousand dollars and costs; that, thereafter, to wit, on April 21, 1914, the Waters Pierce Oil Company was allowed a writ of error, without *supersedeas*, to the United States Circuit Court of Appeals, for the Fifth Circuit, and upon hearing duly had the Circuit Court of Appeals affirmed the judgment of the District Court, and the mandate of the Court of Appeals affirming said judgment was filed in the District Court on June 23, 1915; that, there-

after, an execution upon said judgment was issued out of said District Court, directed to the United States Marshal for the Western District of Louisiana, upon which, on August 2, 1915, the Marshal made and filed a *nulla bona* return.

II.

That at an adjourned regular meeting of the board of directors of the Waters Pierce Oil Company, held on July 9th, 1913, in the City of St. Louis, State of Missouri, the said board of directors, pursuant to a request of holders of more than four-fifths of the capital stock of the Waters Pierce Oil Company authorized the sale of all the property of said corporation to the Pierce Oil Corporation, a corporation organized under the laws of the State of Virginia, for and in consideration of ten million five hundred thousand dollars ($10,500,000.00) of the common capital stock of said Pierce Oil Corporation, and five million dollars ($5,000,000.00) in lawful money of the United States; that Clay Arthur Pierce and Henry S. Priest were appointed by the board of directors as liquidating agents of the Waters Pierce Oil Company, to receive from the Pierce Oil Corporation the consideration aforesaid, and distribute the same among the stockholders of the Waters Pierce Oil Company.

III.

That pursuant to the authority of the board of directors, Clay Arthur Pierce and T. F. Lyden, president and secretary, respectively, of the Waters Pierce Oil Company, and acting for that company, by an indenture dated July 7, 1913, conveyed to the Pierce Oil Corporation all the property and assets of the Waters Pierce Oil Company.

IV.

That Clay Arthur Pierce and Henry S. Priest, as liquidating agents for the Waters Pierce Oil Company, received from the Pierce Oil Corporation ten million five hundred thousand dollars ($10,500,000.00), par value of the common stock of the Pierce Oil Corporation, and five million dollars ($5,000,000.00) in cash, and that they distributed the same *pro rata* among the stockholders of the Waters Pierce Oil Company.

V.

That at the time of the transfer by the Waters Pierce Oil Company of its property and assets to the Pierce Oil Corporation, Henry Clay Pierce was the owner of two thousand seven hundred twenty-seven (2,727) shares of the common stock of the Waters Pierce Oil Company; that the Pierce Invest-

ment Trust Company was the owner of one thousand (1,000) shares of said stock; that Clay Arthur Pierce was the owner of one share of said stock, and that the total number of shares of stock issued by said company and outstanding at said time was four thousand (4,000) shares.

## VI.

That Henry Clay Pierce received from the liquidating agents the sum of three million four hundred eight thousand seven hundred fifty dollars ($3,408,750.00), and that Pierce Investment Trust Company received the sum of one million two hundred fifty thousand dollars ($1,250,000.00), and that Clay Arthur Pierce received the sum of one thousand two hundred fifty dollars ($1,250.00), and that they each received stock of the Pierce Oil Corporation in the amounts and of the value as set opposite their respective names, as follows:

| | Number of Shares. | Value. |
|---|---|---|
| Henry Clay Pierce..... | 71,583¼ | $7,158,375.00 |
| Pierce Investment Trust Company ..... | 26,250 | 2,625,000.00 |
| Clay Arthur Pierce..... | 26¼ | 2,625.00 |

## VII.

That subsequent to the transfer by the Waters Pierce Oil Company of all its property and assets,

the Waters Pierce Oil Company was without funds and ceased to be a going concern, but retained and does retain its corporate identity.

VIII.

That, on February 4, 1916 (and prior to the filing of the creditor's bill in the Eastern District of Missouri), the United States filed in the Western District of Louisiana a bill of complaint against the Pierce Oil Corporation, seeking to recover from the Pierce Oil Corporation the amount of the fine theretofore entered against Waters Pierce Oil Company; that said suit sets forth that under the contract by which the Pierce Oil Corporation acquired the property and assets of the Waters Pierce Oil Company, the Pierce Oil Corporation assumed all debts, liabilities and obligations of the Waters Pierce Oil Company by its express contract.

IX.

That, thereafter, to wit, on February 18, 1916, the United States of America filed, in the Eastern District of Missouri, a creditor's bill against your petitioners, seeking to recover from them the amount of the judgment and fine of fourteen thousand dollars ($14,000.00) obtained as a result of the indictment and proceedings in the Western District of Louisiana.

X.

That, on March 19, 1917, and subsequent to the filing of said bill in the Eastern District of Missouri, execution was issued out of the United States Court for the Western District of Louisiana, directed to the United States Marshal for the Eastern District of Missouri, and on March 28, 1917, said Marshal made a *nulla bona* return on said execution and filed the said writ and return in the office of the Clerk of the United States District Court for the Western District of Louisiana on March 31, 1917.

XI.

That, thereafter, to wit, on August 23, 1917, the United States of America filed its amended bill, which was in all respects similar to its original bill, except that it set up the issuance of execution from the Western District of Louisiana to the Marshal of the Eastern District of Missouri and the *nulla bona* return thereon.

XII.

That your petitioners duly filed their motion to dismiss said amended bill, which was in all things overruled, and thereafter, on March 11, 1918, the cause coming on to be heard before Honorable David P. Dyer, District Judge for the Eastern District of

Missouri, and upon an agreed statement of facts filed therein and setting out the facts heretofore stated by your petitioners, the Court filed its decision, to the following effect: That complainant have and recover of Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company the sum of fourteen thousand dollars ($14,000.00), with interest thereon at 6 per cent from January 29, 1907, for which complainant was awarded execution as at law.

XIII.

That on March 22, 1918, your petitioners duly presented their petition for an appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, and that said petition was on that date allowed and the record of the proceedings in the cause duly filed in the office of the Clerk of the United States Court for the Eighth Circuit.

XIV.

That thereafter the said appeal came on to be heard, and was argued by counsel before Circuit Judges Hook and Stone and District Judge Wade; that said Circuit Court of Appeals, on the 28th day of April, 1919, entered a decree affirming the judgment of the District Court in all things, Judge Wade dissenting from the opinion of the Court.

XV.

That thereafter, and within the time allowed by rule, your petitioners presented their motion for a rehearing, which was on the 15th day of July, 1919, overruled by the Circuit Court of Appeals, Judge Wade adhering to his dissent.

XVI.

That on August 6, 1919, your petitioners duly filed their petition for appeal to the Supreme Court of the United States, and that the same was thereupon allowed, and a transcript of the record was thereupon filed in said court.

XVII.

The questions and propositions of law involved in this case are substantially as follows:

1. Is a judgment for a fine for the violation of a penal statute of the United States a debt that will support a creditor's bill by the United States against the stockholders of the corporation fined, the corporation having theretofore distributed its assets among the stockholders?

2. If such a fine is a debt that will support a creditor's bill, can the United States recover in such a creditor's bill where the distribution of assets to the stockholders was made prior to the trial of the cor-

poration for a violation of the criminal law, and prior to the judgment imposing a fine; *i. e.*, would not the fact that the United States became a creditor subsequent to such distribution preclude its right to maintain the bill?

3. If a corporation sells all of its assets to another corporation, which assumes all the former debts, obligations and liabilities, and the Government thereupon files suit on such covenant of assumption to hold the last-named corporation liable for a fine adjudged against the former, can it subsequently file a creditor's bill to recover the same adjudged fine from the stockholders of the first-named corporation; *i. e.*, is not the Government barred by election of remedies, estoppel or novation?

4. Is the United States of America entitled, under a creditor's bill, to recover a fine adjudged against a corporation, to receive interest upon the amount so adjudged from the date of the indictment and prior to the date of conviction?

5. Is the United States entitled to recover interest upon a judgment for a fine for a violation of its penal laws?

6. Can a judgment for a fine be recovered from one not a defendant in the criminal proceedings, through and by means of a bill in equity?

All of said questions were duly raised and argued by counsel for your petitioners in the District Court and in the Circuit Court of Appeals.

## XVIII.

Your petitioners respectfully submit that a writ of *certiorari* should be allowed herein for the following reasons, among others:

1. Because the questions of law here involved have not been passed upon by this Court or by any Federal Court.

2. Because the public interest and the interest of jurisprudence require the decision of this Court upon the questions of law here involved.

3. Because petitioners feel aggrieved by the decision of said Circuit Court of Appeals for the Eighth Court, in the matters and things aforesaid.

Wherefore, your petitioners respectfully pray that the writ of *certiorari* may be issued out of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of proceedings in the said Circuit Court of Appeals, in the cause entitled: Clay Arthur Pierce, Henry Clay Pierce, Pierce Investment Trust Company, Appellants, v. United States of America, Appellee, No. 5,145, and to the end that said cause may be reviewed and determined by this Court, and the judgment of said Circuit Court of Appeals and of the

District Court be in all things reversed, and for such proceedings therein as to this Honorable Court may seem just and proper.

HENRY CLAY PIERCE and
PIERCE INVESTMENT TRUST COMPANY,

By S. W. FORDYCE, JR.,
THOMAS W. WHITE,
LEVI COOKE,

*Their Solicitors.*

CLAY ARTHUR PIERCE,

By H. S. PRIEST,
ALBERT D. NORTONI,

*His Solicitor.*

State of Missouri, } ss.
City of St. Louis. }

Thomas W. White, being duly sworn, says that he is one of the counsel for petitioners in the foregoing petition for a writ of *certiorari*, and that he has read the foregoing petition, and the same is true to his

own knowledge, and that his knowledge is derived from the record in this case.

THOMAS W. WHITE.

Subscribed to before me this 22nd day of August, 1919.

My commission expires April 9, 1923.

WALTER R. MAYNE,
Notary Public.

State of Missouri, }
City of St. Louis. } ss.

I hereby certify that I have examined the foregoing petition, and it is my opinion that the petition is well founded and that the case is one in which the prayer of the petitioners should be granted by this Court.

THOMAS W. WHITE,
*Of Counsel for Petitioners.*

# BRIEF OF PETITIONERS